



July 19, 2002

Ms. Linda Cloud  
Executive Director  
Texas Lottery Commission  
P.O. Box 16630  
Austin, Texas 78761-6330

OR2002-3975

Dear Ms. Cloud:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code, the Public Information Act. Your request was assigned ID# 165919.

The Texas Lottery Commission (the "commission") received a request for a copy of "the Bingo licensing file" of TXTV Corporation ("TXTV"), any "files created as a result of any investigative action" by the commission of TXTV, "all complaints" received by the commission pertaining to TXTV, and "a copy of the contents of any file generated as a result" of a complaint against TXTV. You have submitted for our review information responsive to this request, marked by you as Exhibits "B" through "I." You assert that this information is excepted from disclosure under sections 552.101, 552.103, 552.107, 552.108, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Initially, we note that a portion of the information at issue is subject to section 552.022 of the Government Code. This provision states in pertinent part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108[.]

Gov't Code § 552.022(a)(1). Exhibit "H" comprises a completed report that is subject to the above-quoted section 552.022(a)(1).<sup>1</sup> This information, therefore, must be released unless it is "expressly confidential under other law" or it is demonstrated to be protected by section 552.108, the law enforcement exception. You have asserted sections 552.103, 552.107(1), and 552.111 for withholding Exhibit H. These exceptions, however, are discretionary exceptions to disclosure under chapter 552 and not "other law" that makes information "expressly confidential" for purposes of section 552.022.<sup>2</sup> We thus conclude that Exhibit "H" may not be withheld under sections 552.103, 552.107(1), or 552.111. You have also asserted section 552.108 in support of withholding Exhibit "H," and we therefore next address this assertion.<sup>3</sup>

Section 552.108(a) excepts from disclosure "[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime." Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov't Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(a); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977).

You represent that Exhibit 'H' was prepared by commission law enforcement officers pursuant to an investigation by the commission's Security Division. Regarding this investigation, you further represent that "no criminal conviction or deferred adjudication has been obtained as of this time," and that the investigation "may still be amended pending further discussion and input by agency personnel." You additionally state that the law enforcement officers "are still involved in the case to the extent that they may be asked to investigate the matters further[.]" We thus understand you to indicate that although the criminal investigation to which Exhibit "H" relates may currently be inactive, it also may be re-opened. You have also demonstrated, as discussed below, that the requested information relates to a pending enforcement action by the commission.

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<sup>1</sup>Exhibit "H" consists of the pages marked by you as "H-1" through "H-13."

<sup>2</sup>Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. *See, e.g.,* Open Records Decision Nos. 630 at 4 (1994) (governmental body may waive attorney-client privilege, section 552.107(1)); 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding); 549 at 6 (1990) (governmental body may waive informer's privilege); 522 at 4 (1989) (discretionary exceptions in general).

<sup>3</sup>This office has previously concluded that the commission is a law enforcement agency for purposes of section 552.108. *See* Gov't Code §§ 466.020 (commission is authorized to maintain department of security staffed by commissioned peace officers or investigators), 466.019 (commission is authorized to enforce violations of lottery laws).

This office has concluded that information about an inactive criminal case may be withheld under the law enforcement exception where it is shown that disclosure would interfere with enforcement proceedings. *See* Open Records Decision No. 216 at 4 (1978). Based on your representations and our review of the information at issue, we thus conclude that the release of Exhibit "H" would interfere with the detection, investigation, or prosecution of crime. *Cf. Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Accordingly, although the information is subject to section 552.022(a)(1), the commission nevertheless may withhold Exhibit "H" pursuant to section 552.108(a)(1).

With respect to all of the remaining information, among other arguments, you assert the litigation exception, section 552.103 of the Government Code. This provision states in pertinent part:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). The commission has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, *writ ref'd n.r.e.*); Open Records Decision No. 551 at 4 (1990). The commission must meet both prongs of this test for information to be excepted under 552.103(a). Further, as provided by the above-quoted section 552.103(c), the litigation must be pending or reasonably anticipated on the date the information at issue was requested.

In this instance, you have demonstrated that the commission initiated enforcement proceedings in February 2002, prior to the commission's receipt of the present request, and you further represent that the matter is currently pending before the State Office of Administrative Hearings. This office has held that a contested case under the Administrative

Procedure Act, chapter 2001 of the Government Code, constitutes litigation for purposes of the section 552.103(a) exception. Open Records Decision No. 588 at 7 (1991). We thus conclude that litigation was pending for purposes of section 552.103(a), and/or that the commission reasonably anticipated such litigation, on the date that the information at issue here was requested.<sup>4</sup> Because our review of the remaining information also indicates that it relates to this litigation, we further conclude that the commission has demonstrated the applicability of section 552.103(a). Accordingly, except as otherwise noted herein, the commission may withhold the remaining information pursuant to section 552.103 of the Government Code.

We note that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed.<sup>5</sup> We further note that the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

In summary, we conclude that the commission may withhold Exhibit "H" pursuant to section 552.108(a)(1) of the Government Code, and except as otherwise noted above, that the commission may withhold the remaining information pursuant to section 552.103(a) of the Government Code. Because these conclusions resolve the matter, we need not reach any of your remaining arguments or assertions.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the

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<sup>4</sup>Although you have also demonstrated that the commission is a defendant in pending litigation that was filed by the requestor, the information provided indicates this litigation did not ensue until after the date the present information was requested. See Gov't Code § 552.103(c). The fact that the requestor filed suit after the date the present request was made does not establish that litigation was pending or was reasonably anticipated by the commission on the date that the information at issue here was requested. Thus, this decision as to the applicability of section 552.103 is not based on the lawsuit initiated by the requestor.

<sup>5</sup>Although portions of the remaining information at issue are indicated to have been provided to the opposing party, you represent that this information actually comprises draft copies and that final versions have been released. To the extent any of the information at issue has not been made available to the opposing party, the commission may withhold that information under section 552.103(a), as provided above.

full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

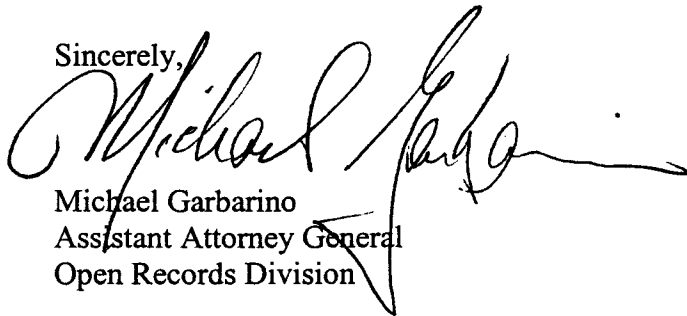
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael Garbarino", with a long horizontal flourish extending to the right.

Michael Garbarino  
Assistant Attorney General  
Open Records Division

MG/seg

Ref: ID# 165919

Enc. Submitted documents

c: Mr. Chris Edwards  
2905 San Gabriel, Suite 212  
Austin, Texas 78705  
(w/o enclosures)